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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY,

NO. CIV. S-04-1986 LKK/DAD

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Plaintiff,

O R D E R

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NATOMAS UNIFIED SCHOOL  
DISTRICT,

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Defendant.

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On February 22, 2005, this court issued an order granting, with leave to amend, plaintiff's motion to dismiss defendant's negligence counterclaim. Defendant, Natomas Unified School District ("NUSD" or "the District"), subsequently filed its first amended counterclaim against plaintiff, St. Paul Fire and Marine Insurance Company ("St. Paul"), which alleges, inter alia, fraud and deceit regarding representations made about a takeover

1 agreement, fraud and deceit regarding representations made about  
2 a mold remediation program, and negligent misrepresentation  
3 (defendant's third, fourth, and fifth counterclaims, respectively).  
4 Pending before the court is plaintiff's motion to dismiss these  
5 three counterclaims.

6 **I.**

7 **FACTS<sup>1</sup>**

8 On or about August 27, 2001, NUSD entered into a written  
9 contract with Gen-Con, Inc. as a general contractor to construct  
10 the Natomas Middle School No. 2 - phase 2 project. St. Paul served  
11 as the surety and issued separate performance and payment bonds,  
12 in the amount of \$11,490,000. Specifically, Bond No. SF6950 was  
13 issued to ensure and guarantee Gen-Con's complete and faithful  
14 performance of the contract and payment for all labor, materials,  
15 services, and equipment required to complete the project.

16 On or about July 15, 2002, after commencing construction on  
17 the project, Gen-Con defaulted under its contract with NUSD and  
18 filed for bankruptcy protection under Chapter 11 of the United  
19 States Bankruptcy Code, in the matter of *In Re Gen-Con, Inc.*, in  
20 the United States Bankruptcy Court, Northern District of  
21 California, Eastern Division, Case No. 02-53885 JRG ("bankruptcy  
22 action").<sup>2</sup> St. Paul initiated an adversary proceeding in the

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23       <sup>1</sup> All facts are derived from NUSD's first amended  
24 counterclaim.

25       <sup>2</sup> NUSD has not named Gen-Con for purposes of service in this  
26 action because of the automatic stay imposed by the bankruptcy  
filing.

1 bankruptcy court.

2 After Gen-Con's default of the contract, representatives of  
3 Natomas notified St. Paul on numerous occasions, orally and in  
4 writing, of Gen-Con's default and requested St. Paul's "immediate  
5 intervention" and action to perform Gen-Con's duties and  
6 obligations under the contract, and to continue, preserve the  
7 condition of, and complete the project. St. Paul allegedly failed  
8 and refused to take control of, enter upon, and preserve the  
9 condition of the project or otherwise act to complete the project  
10 until NUSD agreed to execute a "takeover agreement."

11 On September 23, 2004, St Paul brought suit against NUSD in  
12 this court, arguing that NUSD breached a number of its duties under  
13 the Takeover Agreement. NUSD answered St. Paul's complaint in  
14 December 2004, at which point it also alleged several  
15 counterclaims. In February of 2005, St. Paul successfully moved  
16 to dismiss NUSD's counterclaim for negligence, and the Court  
17 dismissed that counterclaim with leave to amend. NUSD then filed  
18 its first amended counterclaim, with allegations which are at issue  
19 in this motion.

20 **II.**

21 **STANDARDS ON A MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b) (6)**

22 On a motion to dismiss, the allegations of the complaint must  
23 be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972).  
24 The court is bound to give the plaintiff the benefit of every  
25 reasonable inference to be drawn from the "well-pleaded"  
26 allegations of the complaint. See Retail Clerks Intern. Ass'n,

1       Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).  
2       Thus, the plaintiff need not necessarily plead a particular fact  
3       if that fact is a reasonable inference from facts properly alleged.  
4       See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963)  
5       (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

III.

## **ANALYSIS**

22 \_\_\_\_\_St. Paul contends that the District's two fraud claims and  
23 negligent misrepresentation claim should be dismissed because the  
24 District has failed to allege facts which would allow it to prevail  
25 on these claims. St. Paul also contends that the District has not  
26 pled the three claims with the requisite specificity as set forth

1 by Fed. R. Civ. P. 9(b). As I explain below, St. Paul's motion to  
2 dismiss the District's counterclaims must be granted with leave to  
3 amend.

4 **A. THIRD COUNTERCLAIM: THE DISTRICT'S FRAUD CLAIM REGARDING THE  
5 TAKEOVER AGREEMENT**

6 The elements that give rise to a tort action for fraud and  
7 deceit in California are (1) misrepresentation, (2) knowledge of  
8 falsity or scienter, (3) intent to defraud, (4) justifiable  
9 reliance and (5) resulting damage. City Solutions, Inc. v. Clear  
10 Channels Communications, Inc., 365 F.3d 835, 839 (9th Cir. 2004)  
11 (citation omitted). St. Paul argues that the District has failed  
12 to allege three elements of fraud: misrepresentation; justifiable  
13 reliance; and resulting damage. As explained below, St. Paul's  
14 motion to dismiss this cause of action must be granted because the  
15 District fails to allege a misrepresentation of fact, a requisite  
16 for suit.

17 The District alleges in its third counterclaim that:

18 . . . St. Paul represented that Natomas was required to  
19 sign St. Paul's Takeover Agreement before St. Paul could  
20 or would proceed with the project as it was obligated to  
21 do under Performance Bond No. SF6950. Natomas is  
22 informed and believes and on those grounds alleges that  
23 St. Paul's representations were in fact false and that  
no provisions of the contract or performance bond, or  
law, required Natomas to execute a Takeover Agreement,  
as a condition precedent to St. Paul performing its  
obligations, or at all (emphasis supplied).

24 Countercl. at ¶ 22.

25 The District also alleges that St. Paul made such  
26 representations with the intent of fraudulently inducing Natomas

1 to rely on those representations to sign a Takeover Agreement, "in  
2 an effort to remove many of Natomas' rights to which it was  
3 entitled under the underlying contract." The District claims that  
4 St. Paul made such representations knowing that they were false or  
5 misleading, and that it acted in reliance on such representations  
6 by attempting to negotiate a Takeover Agreement, which caused the  
7 construction project to be delayed. Countercl. at ¶ 23.

In sum, the District is alleging that St. Paul misrepresented the law. The counterclaim explicitly states that "St. Paul's representations were in fact false and that no provisions of the contract or performance bond, or law, required Natomas to execute a Takeover Agreement." Countercl. at ¶ 21.

The Ninth Circuit has explained that "fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." Miller v. Yokohama Tire Co., 358 F.3d 616, 621 (9th Cir. 2004) (citing Am.Jur.2d of Fraud and Deceit § 97 (2001)).<sup>3</sup> "[S]tatements of domestic law are normally regarded as expressions of opinion which are generally not actionable in fraud even if they are false." Id. However, "if a misrepresentation as to matter of law includes, expressly or by implication, a misrepresentation of

22       <sup>3</sup> The Ninth Circuit explains that the general rule is not  
without exception because the Restatement lays out four special  
23 situations that would justify reliance on such a misrepresentation  
of law: Where the party making the misrepresentation (1) purports  
24 to have special knowledge; (2) stands in a fiduciary or similar  
relation of trust and confidence to the recipient; (3) has  
25 successfully endeavored to secure the confidence of the recipient;  
(4) or has some other special reason to expect that the recipient  
26 will rely on his opinion. Miller, 358 F.3d at 621. The District  
has failed to allege any of these circumstances.

1 fact, the recipient is justified in relying upon the  
2 misrepresentation of fact to the same extent as though it were any  
3 other misrepresentation of fact." Restatement 2d., Torts § 545.  
4 See Crandall v. Parks, 152 Cal. 772, 776 (1908).

5 The present complaint does not allege that St. Paul's  
6 representations included express or implied misrepresentations of  
7 fact. Thus, the District's fraud claim as to the takeover  
8 agreement does not lie.

9 **B. FOURTH COUNTERCLAIM: THE DISTRICT'S FRAUD CLAIM REGARDING THE  
10 MOLD REMEDIATION PLAN**

11 In its fourth counterclaim, the District alleges that St. Paul  
12 falsely represented that the District "was required to agree to an  
13 unreasonable mold remediation plan before St. Paul could or would  
14 proceed with the project" with the intent of inducing the District  
15 to agree to the allegedly unreasonable program. Countercl. at  
16 ¶¶ 31, 32.

17 The District further alleges that St. Paul knew that the above  
18 representation was false, but that it ultimately agreed to the  
19 unreasonable mold remediation plan. As with the third cause of  
20 action, the District asserts that it incurred damages due to St.  
21 Paul's allegedly fraudulent inducement. In addition, it avers that  
22 while the two parties were negotiating the terms of the remediation  
23 agreement, the construction was unduly delayed and the mold caused  
24 further damage to the District's property. St. Paul contends that  
25 the District fails to allege a misrepresentation, knowledge of  
26 falsity, and justifiable reliance.

1 Again, the district's counterclaim falls short. The District  
2 merely incorporates its previous allegations and additionally  
3 claims that St. Paul "represented that Natomas was required to  
4 agree to an unreasonable mold remediation plan before St. Paul  
5 could or would proceed with the project." Countercl. at ¶ 31. The  
6 fourth counterclaim fails to allege that there was a  
7 misrepresentation fact.

8 As explained above, because misrepresentation gives rise to  
9 a fraud claim only if it is a misrepresentation of material fact,  
10 as opposed to misrepresentation about the law applicable to facts  
11 equally known to both parties, such an allegation is not  
12 cognizable. See Miller, 358 F.3d at 621. Accordingly, the  
13 District's fourth counterclaim is dismissed.

14 **C. FIFTH COUNTERCLAIM: THE DISTRICT'S NEGLIGENT  
MISREPRESENTATION CLAIM**

16 Under California law, the elements of negligent  
17 misrepresentation are: (1) misrepresentation of a past or existing  
18 material fact, (2) without reasonable ground for believing it to  
19 be true, (3) with intent to induce another's reliance on the  
20 misrepresentation, (4) ignorance of the truth and justifiable  
21 reliance by the party to whom it was directed, and (5) resulting  
22 damages. Jackson v. Roe, 73 F.3d 1192, 1201 n.2 (9th Cir. 2001)  
23 (citations omitted).

24 In the case at bar, the District alleges that St. Paul,  
25 "represented that Natomas was required to comply with St. Paul's  
26 unreasonable and unjust demand, on two separate occasions

1 [regarding the takeover agreement and the mold remediation plan]  
2 before St. Paul could or would proceed with the project."  
3 Countercl. at ¶ 41. The District avers that St. Paul made the  
4 representations with the intent to induce reliance on the  
5 misrepresentations and that it was not aware of the falsity of the  
6 representations and relied on them to its detriment.

7 The only difference between negligent misrepresentation and  
8 fraud is that for negligent misrepresentation, the party making the  
9 misrepresentation need not know of its falsity but instead must  
10 make the representation without reasonable grounds for believing  
11 it to be true. See, e.g., B.L.M. v. Sabo & Deitsch, 55 Cal.App.4th  
12 823 (1997). The District, however, must still allege facts showing  
13 that St. Paul misrepresented some material fact. Because this  
14 cause of action is premised on the same allegations in the third  
15 and fourth counterclaim, it also fails under the common law because  
16 misrepresentations as to legal opinion are not actionable.

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1                   **IV.**

2                   **CONCLUSION**

3       St. Paul's motion to dismiss the District's third, fourth, and  
4       fifth counterclaims is GRANTED with leave to amend.<sup>4</sup>

5       IT IS SO ORDERED.

6       DATED: July 26, 2005.

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8                   /s/Lawrence K. Karlton

9                   LAWRENCE K. KARLTON  
10                  SENIOR JUDGE  
11                  UNITED STATES DISTRICT COURT

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25       <sup>4</sup> The District is granted fifteen (15) days from the date of  
26       this order to amend their counterclaims. Counsel is admonished  
that amendments not made in good faith shall result in sanctions  
being issued pursuant to Fed. R. Civ. P. 11.